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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Pinehurst Office Center
Suite 101
1400 North Woodward Avenue
Bloomfield Hills, MI 48304-2856
Telephone (810) 645-1483
Fax (810) 645-1568

The Kalamazoo Building
Suite 400
107 West Michigan Avenue
Kalamazoo, MI 49007-3956
Telephone (616) 382-1483
Fax (616) 382-1568

The Phoenix Building
Suite 500
222 Washington Square, North
Lansing, MI 48933-1817
Telephone (517) 485-1483
Fax (517) 485-1568

The Creve Coeur Building
Suite 200
321 Liberty Street
Peoria, IL 61602-1403
Telephone (309) 672-1483
Fax (309) 672-1568

[illegible]ca Plaza
Suite 2000
201 East Kennedy Boulevard
Tampa, FL 33602-5829
Telephone (813) 229-1483
Fax (813) 229-1568

Eric E. Breisach — **Kalamazoo Office** — **Direct Dial: (616) 382-9711**

July 24, 1996

Via Hand Delivery
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses; GN Docket No. 96-113

Dear Mr. Caton:

Enclosed is an original and 6 copies of the Comments of the Small Cable Business Association in the above-referenced matter. Also enclosed is a copy to date-stamp and return in the pre-addressed Federal Express envelope.

Very truly yours,

Howard & Howard

Eric E. Breisach

EEB:cm
cc: David Kinley
Enclosures
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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses	)	GN Docket No. 96-113
	)	

COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

Eric E. Breisach
Christopher C. Cinnamon
Howard & Howard
107 W. Michigan Ave., Suite 400
Kalamazoo, Michigan 49007
(616) 382-9711

Attorneys for the
Small Cable Business Association

July 24, 1996

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SUMMARY

The Commission undertakes this statutorily mandated omnibus rulemaking to ensure that small cable and other small telecommunications providers do not face market entry barriers. Small cable currently faces barriers that prohibit expansion of services and others that make entry into new business lines impossible. Small cable faces barriers created by competitors (e.g., local exchange carriers ("LECs") that will not permit interconnection) and by statutes and regulations that either impose burdens on small cable, or allow others to create barriers.

This rulemaking permits the Commission to globally assess the impact its regulations have on small cable. The Small Cable Business Association ("SCBA") provides much of the information requested by the Commission, but also provides detail regarding SCBA's concerns about hurdles and outright barriers faced by small cable. These concerns are not new to the Commission. SCBA has articulated them in detail and proposed alternative regulatory methodologies. The Regulatory Flexibility Act requires the Commission to consider those alternatives. Section 257 also requires the barriers to fall.

SCBA has detailed its concerns in *Comments* and, in some cases, *Reply Comments* for the following dockets:

- **Leased Commercial Access. CS Docket No. 96-60.**
  The Commission's regulations, when effective, will cost small cable $24 million in unnecessary initial compliance costs. The Commission's proposed regulations will cause a stampede of demand as small cable's computed leased access rate will often be zero. Sudden implementation of a requirement ignored by the programmers for 11 years will produce subscriber confusion and frustration and will put small cable at a tremendous competitive disadvantage.

- **Cable Act Reform Implementation. CS Docket No. 96-85.**
  The Commission must ensure that it does not make small cable regulatory relief mutually exclusive with procurement of financing. The Commission must carefully design the affiliation standards to avoid closing the capital markets to small cable.

- **Interconnection. CC Docket No. 96-98.**
  The Commission must adopt strong national standards governing terms and conditions of telco interconnection. These standards must include special provisions for small cable operators to avoid allowing LECs to wage a war of economic attrition, effectively barring small cable from providing competing telephony service.

  SCBA also identifies other entry barriers that the Commission must address under §257:

- **Disparate program acquisition costs.**
  The Commission is aware, through SCBA's *Comments* filed in CS Docket No. 95-61, that continued price discrimination by certain independent programmers and their refusals to deal with the National Cable Television Cooperative, place small cable at a substantial competitive disadvantage compared to large providers of video services, including direct broadcast satellite ("DBS") and certain wireless providers. This disparate pricing rises to the level of a barrier impeding future growth and development of small cable.

  SCBA has also noted the high cost of retransmission consent, both in terms of dollars charged small cable and demands that channel locked small cable operators carry additional programs. These tactics deprive small cable of customer desired programming, the absence of which places small cable at a disadvantage. If small cable capitulates to these demands, the high cost can also make the operator's services non-competitive, creating another barrier to expanding services.

- **High Pole Attachment Cost.**
  Many small operators must rely on attachments to poles owned by unregulated co-operatives. Small cable has seen two and three digit percentage increases. Some operators have seen increases over 1,000% put through at a time when the co-operative began selling DBS services. The Commission must gather evidence of such abuses and report the need for corrective legislation to Congress.

The Commission must define the threshold term "small business" at the beginning of its review.[1] SCBA reminds the Commission of its statutory obligation under the Small Business Act to seek the approval of the SBA Administrator prior to adopting any definition of a "small business."

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[1]*Notice of Inquiry* "(*NOI*") at ¶ 40.

In all events, the Commission's definition of a small business should encompass all entities eligible for either small system regulatory relief under Form 1230 and pursuant to the Telecommunications Act.

SCBA strongly urges the Commission to fully consider the needs of small cable in the concurrent rulemakings. The Commission should do it right the first time. If it does not address these needs, SCBA will seek redress as part of this rulemaking. SCBA suggests that the Commission prepare a comprehensive *Notice of Proposed Rulemaking* listing specific rule modifications to alleviate the barriers faced by small cable.

SCBA and its members remain ready to provide the Commission with any additional data necessary in order to facilitate Commission action that will ensure the delivery of competitive services to rural America.

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COMMENTS
OF THE
SMALL CABLE BUSINESS ASSOCIATION

I. INTRODUCTION

A. Inquiry directly applies to small cable.

The cornerstone of the Telecommunications Act of 1996 ("Act") is ***competition***. Throughout the Act, Congress sought to dislodge entrenched monopolies, replacing regulation with market-driven behavior.[2] This rulemaking required by § 257 provides an important initial review to ensure that the Commission removes all barriers to entry. It also provides a continuing forum to ensure the removal of future barriers.[3]

Small cable providers squarely fall within the class of small businesses Congress sought to protect:

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[2]*See, e.g.*, Act § 402 (requiring biennial review to eliminate all regulations made unnecessary by the development of competitive forces).

[3]47 U.S.C. §257.

> [T]he Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other ***small businesses in the provision of and ownership of telecommunications services and information services***, or in the provision of parts or services to providers of telecommunications services and information services.[4]

Small cable has played an important role in providing telecommunications to much of rural America. One thousand five hundred cable companies operate 11,200 cable systems in the United States.[5] Of these systems, approximately 66% have fewer than 15,000 subscribers and are owned by small companies[6], the level previously determined by the Commission to constitute a small cable system warranting reduced regulatory treatment.[7] Although these small systems comprise 87% of the national total, they serve only 12.5% of the nation's population, reflecting the concentration of the industry into a small group of very large providers.[8] These large operators, however, cluster their

[4]47 U.S.C. §257 (a) (emphasis added).

[5]*Sixth Report and Order and Eleventh Order on Reconsideration*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Dockets No. 92-266 and 93-215 (released June 5, 1995) ("*Small System Order*") at ¶ 27.

[6]*Small System Order* at ¶ 33.

[7]*Id* at ¶ 25 ("We acknowledge that a large number of small cable operators face difficult challenges in attempting simultaneously to provide good service to subscribers, to charge reasonable rates, to upgrade networks, and to prepare for potential competition.").

[8]The largest 10 cable operators serve 79.9% of the nation's subscribers. The 50 largest serve 96.6%. *Second Annual Report*, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61 (released December 11, 1995) ("*Competition Report*") at Appendix G, Table 4.

systems[9] around urban areas, resulting in service to large segments of the population, without necessarily serving large geographic areas.

Rural America relies heavily on small cable to deliver video programming services. These areas typically produce lower rates of return due to the lower densities of homes and higher operating costs.[10] In many rural areas, the incumbent local exchange carrier ("LEC") could also have provided cable service pursuant to the rural area exemption[11]. Most chose not to provide cable service, leaving it up to small independent, often family-owned, cable companies to bring innovative video services to rural regions.

Historically, cable is the only facilities-based provider that has not required government support to deploy service to rural America. Telephone, electricity and water have all required forms of government assistance in the form of taxpayer supported financing, tax exemptions and favorable regulatory treatment as incentives to provide service to rural America. Before the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), small cable willingly undertook the risks to provide cable service to rural America. Small cable operators will contribute significantly to achieving the goals of Congress by deploying new and innovative video, voice and data services to rural America. Small cable needs, however, for the Commission to remove significant barriers that hinder or prevent small cable from achieving these important goals.

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[9]*Competition Report* at ¶¶ 142 - 146.

[10]*Small System Order* at ¶ 56 ("We are particularly sensitive to the notion that smaller systems face disproportionately higher costs.").

[11]47 U.S.C. § 533(b)(3).

Even though the Commission devotes significant attention to women and minority business issues in the *NOI*, the plain language of § 257 applies to small businesses. SCBA does not object to efforts to assist women and minority owned businesses so long as those efforts do not dilute the benefits provided to small cable as a small business, without regard to the gender or race of the owner(s).

B. Composition of SCBA.

SCBA is the only national cable trade association comprised exclusively of small cable providers. SCBA grew from a grass-roots effort by small cable operators to cope with the burdens imposed by the Commission's implementation of the 1992 Cable Act. From the meeting of small operators in May 1993 where SCBA was spontaneously formed, SCBA has grown into a proactive force, currently having approximately 350 members. SCBA has actively participated in rulemakings affecting small cable.

C. Relationship to ongoing rulemakings.

Many of the barriers to entry identified in this rulemaking resulted from current or past rulemakings and could be immediately remedied as part of current rulemakings. If current rulemakings fail to remove these barriers, or worse yet, impose new barriers, the Act requires the Commission to remedy these situations through this proceeding.

SCBA also highlights areas where the Commission may find statutory provisions creating barriers to entry. SCBA highlights these provisions to assist the Commission in making a complete report to Congress.

II. IDENTIFYING MARKET BARRIERS

A. Types of expansion sought by small cable.

Small cable currently provides a subset of the telecommunications services its subscribers desire. Many SCBA members seek to deliver a greater variety of video programming services and also to provide new lines of telecommunications products.

1. Expansion of existing market.

Many small cable operators plan to expand their channel offerings either by adding tiered channels or by adding services sold on a per channel basis. Both typically require investment of capital to expand plant capacity and place appropriate equipment in customers' homes. Once in place, small cable can increase the diversity of its programming and remain competitive with the full programming line-ups offered by DBS, MMDS and emerging digital MMDS providers.

2. Expansion into new markets.

Some small cable operators seek to enter new business lines such as competitive access, distance learning and local exchange. Given the higher cost of building plant in rural areas, small cable represents the only realistic source of facilities-based competition for many communities. Without removal of all barriers to entry, many communities will not enjoy the benefits Congress sought to deliver.

B. Types of barriers encountered.

Small cable faces barriers erected not only by competitors, but also by the law:

1. Erected by competitors.

Barriers erected by competitors typically involve denial of access to system elements, either through interconnection, or refusals to allow resale. The Act aims squarely at limiting many of these refusals by governing terms and conditions for interconnection and resale.

2. Erected by law.

Statutes and regulations currently restrict the ability of a cable operator to provide enhanced services. Some of these restrictions run to the core of the cable television business such as restrictions on programming and pricing. Others run to refusals to limit the ability of those with vital facilities and conduit to either deny capacity or to require exorbitant terms and conditions as a condition of carriage (e.g., pole attachment terms and conditions of rural telephone co-operatives).

These barriers stifle accomplishment of the Act's principal goal -- increased competition. The law requires that the Commission remove these barriers where it has authority.[12] Where it does not, the Commission must report to Congress and recommend their removal.[13]

C. Responses to specific Commission inquiries.

The Commission requests commenters to provide profile data about small telecommunications businesses,[14] a category that includes small cable. No comprehensive database of small cable attributes currently exists to provide precise quantitative data solicited by the *NOI*. Nevertheless, the Commission has performed extensive studies of small cable attributes that resulted in a comprehensive

[12] 47 U.S.C. § 257.

[13] *Id.*

[14] *NOI* at ¶ 24.

set of regulations.[15] Based on this information and through SCBA member surveys, SCBA provides the following responses to specific questions raised in the *NOI*:

1. Profile data.

a. Ownership structure.

Most small cable companies are family-owned businesses. Some businesses are owned by a single generation, others by more than one. The entity structures range from sole proprietorships to small corporations and partnerships.

b. Communications services provided.

Most small cable operators only provide multi-channel video programming services. Some small cable providers also provide local exchange services but only because they were incumbent telephone providers who took advantage of the rural area exemption to the former cross-ownership ban. A handful of the better capitalized small cable companies have begun providing alternate access and distance learning services.

c. Geographic regions served.

Rural cable typically serves lower density, less urban areas. By nature, although the areas serve a small segment of the population, they comprise a significant geographic portion of the United States.

d. Primary markets.

The current core market of small cable remains the provision of multichannel video programming services to residential customers.

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[15] *Small System Order* at ¶¶25 - 36.

e. Number of employees.

The number of persons that a small cable operator employs varies directly with the number of customers served. Typically the owners and/or family members of the smallest cable operators manage and operate their own cable systems. In slightly larger companies, employees from outside the family typically fill clerical and technical positions. Most systems with more than a few thousand subscribers typically employ more than 5 persons. A federal statute requires these companies to file comprehensive Equal Employment Opportunity reports with the Commission that disclose the composition of employees by race and gender.[16] These reports will provide the detail the *NOI* seeks. The Commission can closely examine this database.

f. Capital requirements.

As a facilities based provider, cable television requires large amounts of capital to expand its array of video programming. Similarly, most other provision of telecommunications services also requires investment in extensive facilities, making entry feasible only for those who can access the capital markets.

g. Funding sources.

Small cable relies on a variety of funding sources, virtually all of which involve private placement. Most small cable operators cannot access publicly traded capital because of their size. Rather, they rely on venture capital firms and on banks, local and national, that extend credit to small cable. Many investors in cable are either wealthy individuals or institutional investors. Institutional investors include a variety of entities including private trusts, insurance companies, mutual funds and retirement funds.

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[16] 47 U.S.C. § 554.

h. Revenue, income and profit levels.

Small cable typically derives less revenue per subscriber than their large company counterparts.[17] This results from often serving more rural areas that may have lower socio-economic levels than large urban areas. It also reflects small cable's typically more limited offering of premium services which require even greater levels of capital investment. In prior SCBA surveys, members have indicated substantial accounting losses, especially where systems were upgraded and services added.

2. Commission identified barriers to entry.

SCBA provides the following specific responses to Commission inquires. Later in these comments, SCBA will discuss in greater detail specific barriers to entry.

a. Accessing capital.

Capital attraction has always posed challenges for small cable. The onset of a harsh regulatory environment resulting from the 1992 Cable Act scared away many investors. The *Small System Order's* reduced regulatory burdens encouraged investors and creditors to renew their faith in small cable. Congress' further deregulation of small cable businesses in the Act continued this trend. The Cable Act Reform rulemaking threatens to undercut Congressional relief and may again destabilized the capital markets. If the Commission defines an affiliate too broadly, relief intended by Congress will be lost as will access to many forms of needed capital.

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[17] *Small System Order* at ¶ 27(c).

b. Terms and conditions.

Small cable typically obtains capital under much less favorable terms than larger providers. Small cable typically obtains credit at several points above rates paid by larger entities.[18] Similarly, small cable must frequently pay higher rates of return to attract equity investors.[19] This higher cost typically reflects the additional risk premium demanded by the markets. Investors and creditors generally consider their money at greater risk where a small company provides service in a capital intensive business. This historic perception of risk also increases if a future competitor is a larger LEC or other large provider.

c. Difficulties with suppliers.

Disputes with suppliers over disparate treatment between large and small cable operators have erupted over the past few years. Small cable has fought hard to obtain equitable pricing for programming services. Cable's competitors such as DBS may purchase programming at heavily discounted national rates. Small cable must purchase the programming at much higher cost. To combat this, many small cable operators formed the National Cable Television Cooperative

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[18]The higher cost of capital caused the Commission to grant small cable greater latitude in deviating from the presumptive 11.25% standard as evidenced by the Commission's discussion in the *Small System Order* at ¶ 61.

[19]*Id.*

("NCTC"), allowing them to purchase programming at large company discounts. Unfortunately, some programmers steadfastly refuse to participate.[20]

Similarly, the development and deployment of new technology such as digital boxes for use on customer premises will likely be offered first and at lowest per unit cost to large cable operators. Delay of product availability or selling at an economically infeasible price will hinder small cable's ability to compete with other larger multichannel video programmers, some of whom already offer digital service.

d. Interconnection obstacles.

Interconnection remains out of reach of most small cable operators today. Although a LEC may theoretically offer interconnection, negotiating equitable terms and conditions can be arduous, if not impossible. Tactics used by LECs against small cable often include lengthy discussion and application procedures followed by numerous meetings in which the LEC constantly changes personnel, destroying continuity and making finalization difficult if not out of the economic reach of most small operators. SCBA discusses the interconnection issue in greater detail later in these Comments.

e. High deposit requirements.

Both interconnection and resale often require the deposit of a significant sum of cash as a precondition to entering into an arrangement. Other services that require state approval often require

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[20]Most of the major programmers refusing to participate are owned or controlled by Walt Disney Company (including those services formerly owned by Capital Cities/ABC) including The Disney Channel, ESPN, ESPN2, Lifetime and Arts & Entertainment. SCBA raised this issue with the Commission as part of its *Petition to Deny* the license transfers from Capital Cities/ABC to Disney. The Commission denied the *Petition*, not only leaving a barrier to entry in place, but also allowing its potential expansion as the new Disney wields increasing market power.

substantial deposits prior to acting on license applications.[21] These deposits increase the cost of doing business, making entry by small cable more difficult and less competitive. Unnecessary deposits currently provide an excellent vehicle for incumbent telephony providers to forestall competition from smaller entities.

f. Obtaining government benefits.

Small cable must obtain franchises from local governments as a precondition to providing service.[22] Small cable encounters difficulty obtaining these franchises where the local government seeks to impose economically unviable system technology or system architecture. Congress sought to limit this conduct.[23] The issue is currently the subject of a rulemaking proceeding.[24] Local franchise authorities heavily lobbied the Commission during the comment period to allow them to demand technical system specifications.[25] The Commission has the obligation[26] to remove this barrier.

Small cable finds itself competing against telecommunications and utility providers that received tremendous benefits through low cost public financing. Many have accumulated huge cash reserves that they now seek to turn to competitive war chests. Small cable has not had access to similar financing arrangements

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[21]One SCBA member reported a $20,000 deposit requirement simply to submit a state PUC application.

[22]47 U.S.C. §541(b).

[23]47 U.S.C. §544(e).

[24]CS Docket No. 96-85.

[25]*See, e.g.*, Comments of the cities of Indianapolis and Denver.

[26]47 U.S.C. § 544(e).

g. Strategic partners.

Small cable often has difficulty attracting strategic partners. This flows from both the relatively small size of most small cable businesses and their willingness to accept lower returns on investment. Large providers typically focus on partnering with other large providers. Partnering with small providers carries high transaction costs and lower rates of return.

Often the most viable strategic partner for bringing advanced telecommunications services to rural areas is the local telephone company. In many cases, however, joint ventures or other co-operative ventures are prohibited,[27] even if the local community government believes it in the best interest of its citizens. The absence of a broad rural area exception to the joint-venture and buy-out prohibitions of the Act will act as a barrier to market development.

h. Unique obstacles.

Small cable faces problems not faced by retail or service sector businesses. These problems center around the high cost of building or expanding facilities coupled with the high cost of procuring quality programming. As previously discussed, even if an operator raises capital to invest in plant capacity expansions, it still must pay high rates to purchase programming, costs that place small cable at a competitive disadvantage. These higher programming costs, especially when placed on top of high capital costs, constitute a very real barrier to expanded services.

D. SCBA identified barriers.

SCBA has identified a number of major barriers to entry in its discussions with the Commission and in its detailed submissions in other rulemakings. SCBA reviews these issues below and refers to previously filed comprehensive submissions.

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[27] Act § 652.

1. Inadequate access to capital.

Congress expressly sought to deregulate small cable. It was concerned, however, that certain large vertically integrated media companies might be able to use the deregulatory rules. To avoid this, Congress placed caps on the size of companies that qualify for deregulatory treatment:

> [T]he term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.[28]

The Commission currently has rulemaking[29] underway that will define the relationships that constitute an "affiliation" that would disqualify a company from reduced regulatory burdens. It also seeks to determine how the $250,000,000 should be measured and suggests several measures that would severely restrict the size of company with which a cable operator could affiliate.

SCBA has filed comprehensive *Comments*[30] and *Reply Comments*[31] suggesting less burdensome standards that reflect the reality of small cable financing. If the Commission adopts even some of its current proposals many small operators would face an unrealistic choice: (1) accept deregulation and forego outside financing; or (2) accept outside financing and forego deregulation. Congress did not intend for deregulation and the availability of outside financing to be mutually exclusive. Rather, Congress intended that ***deregulation would foster access to capital***.

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[28]47 U.S.C. § 543(m)(2).

[29]CS Docket No. 96-85.

[30]Copies of *Comments* are enclosed as Exhibit "A".

[31]Copies of *Reply Comments* are enclosed as Exhibit "B".

The Commission's proposals run contrary to the goals of Congress because they fail to recognize the manner in which cable systems are financed. Many small cable systems either have passive equity investors or plan to seek passive institutional financing. This financing can result in persons or entities holding large equity shares, without any ability to exercise control (e.g., a limited partnership interest). Such investments should not disqualify a cable operator from receiving the regulatory relief designed by Congress.

Access to capital remains key to allowing small cable to participate in the delivery of competitive telecommunication services. Small cable endured a period during which it was exposed to the same rate regulatory mechanisms imposed on large operators. When applied to small cable, these mechanisms produced disparately harsh results. These results coupled with future regulatory uncertainty destabilized small cable to the point where most operators could not attract -- and some could not even retain -- sources of capital.

SCBA has set forth a framework by which the Commission can implement the restrictions intended by Congress without undercutting deregulation. Failure to establish an appropriate affiliation standard in Docket No. CS 96-85 will ***create*** a barrier to entry that must be removed as a result of this proceeding.

2. Programming Restrictions.

Small cable faces two challenges when procuring programming. First, because small cable typically has lower channel capacity than large cable, government mandated use of channels results in a harsher impact. Second, because it lacks leverage, small cable often has difficulty obtaining programming on terms and conditions comparable to those given competitors.

Small cable has programming discretion over relatively few channels. Small cable typically offers fewer channels than larger operators.[32] The programming offered by cable operators remains heavily controlled by government. Operators must often carry a host of local off-air television stations asserting must-carry rights as well as public, education and government channels.[33] Certain commercial programmers may appropriate up to another 15% of their channels for use as leased access channels.[34] This leaves relatively few channels for a cable operator to program.

Small cable faces challenges when it attempts to select programming that it wants to carry. If a small operator selects the programming of an off-air station that has elected retransmission consent, it will often have difficulty obtaining consent on reasonable terms and conditions. If a small operator selects satellite-delivered programming, it often cannot procure the programming on terms and conditions comparable with those given larger competitors. We examine these issues in greater depth.

a. Retransmission Consent Costs.

To obtain rights to cablecast many popular local off-air television stations, operators must procure retransmission consent rights. The Commission currently does not regulate terms and conditions of retransmission consent contracts often resulting in unavailable or overpriced

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[32]The Commission's *Competition Report* bears this out. It states that 96.6% of customers receive service from one of the largest 50 companies (Appendix G, Table 4). This means that 1,450 companies provide service to 3.4% of the customers. The Commission also notes that 97% of all customers receive at least 30 channels (¶ 7). This means that 3% of the nations subscribers receive fewer than 30 channels. SCBA maintains that most of the 3% of subscribers receiving fewer channels overlap with the 3.4% of subscribers not served by one of the 50 largest operators.

[33]47 U.S.C. §§ 534 and 535.

[34]47 U.S.C. § 532.

programming. Without programming to meet subscriber desires, cable has no value to confer. Programming procured at unreasonable rates results in costs disproportionate to the value conferred.

Larger cable operators and other national distributors of video programming (e.g., large MMDS and other providers) typically have greater leverage and obtain retransmission consent agreements more easily. These operators often offer national carriage agreements that programmers find either very attractive or essential to their survival. Small cable has no similar leverage -- the roles are reversed.

Local broadcast stations typically have leverage over the small cable operator. A small cable operator's customers will expect to receive popular local broadcast programming on cable. The local station can, however, refuse to grant consent without materially impacting its ratings. Small cable often finds itself in no-win situations that many broadcasters exploit for commercial gain.

Small cable needs regulations to level the playing field. SCBA has pointed out the concerns governing higher retransmission consent prices for small systems as well as tying arrangements where broadcasters force small cable to purchase satellite programming services as a precondition to receiving retransmission consent. SCBA more fully outlined its concerns governing retransmission consent abuses when it filed its *Petition to Deny*[35] and *Reply to the Opposition*[36] in the Capital Cities/ABC merger with Disney.

The Commission should restrict the ability of broadcasters to engage in disparate pricing of retransmission consent with respect to large and small video programming distributors. Regulations

[35]Copy of *Petition to Deny* enclosed as Exhibit "C".

[36]Copy of *Reply to the Opposition* enclosed as Exhibit "D".

should also preclude broadcasters from requiring the purchase of additional cable programming services, especially by channel-locked smaller operators.

b. Program Access Costs.

Most multichannel video programmers, except for cable operators, have the right to procure programming at competitive costs.[37] SCBA members, like most small cable operators, report paying approximately 54% more than large cable operators for programming.[38] Cost differentials in the single largest operating expenditure by small cable results in a tremendous competitive disadvantage when one realizes that national DBS and MMDS providers obtain similar discount pricing.

Many operators compensate for these cost differences by purchasing programming at reduced rates through a buying co-operative, NCTC. Several programmers, however, refuse to participate and continue to charge stiff rate differentials to all small cable operators. These programmers are predominately those owned by the Walt Disney Company, including those formerly owned by Capital Cities/ABC.[39]

SCBA has provided the Commission with detailed analysis of these program pricing issues and includes its *Reply Comments* from CS Docket No. 95-61 behind Tab "E".

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[37]47 U.S.C. § 548.

[38]*Supplemental Comments of SCBA in Further Support of Interim Benchmark Adjustments for Low Density and Small Cable Operators*, MM Docket No. 92-266 (dated February 15, 1994).

[39]*See* Note 20, supra.

c. Leased Commercial Access.

The 1984 Cable Act requires cable operators to set aside 10 to 15% of their channel capacity for use by leased access programmers.[40] The operator has no control over the content of leased access programming. Consequently, operators cannot ensure that the programming carried on those channels confers value to their customers.

Requiring small systems to relinquish large blocks of channels results in greater disruption of viewing patterns and subscriber dissatisfaction. These changes put small cable at a competitive disadvantage to other providers of multichannel video programming services -- ***none of which are required to carry leased access programming.***

In addition to loss of subscriber value, the currently proposed Commission regulations establishing the price of leased access capacity would result in a "give away" of small cable leased access channels. ***The formula results in free leased access.***[41]

Inability of small cable to meet subscriber needs and the loss of compensation for the value conferred to leased access programmers individually and cumulatively constitute a competitive impediment sufficiently significant to constitute a barrier to continued development of services. Those cable systems with 35 or fewer activated channels that currently do not have an obligation to provide leased access channels have little incentive to expand capacity above 35 channels (a move that triggers leased access obligations). Many low-capacity systems cannot procure financing for

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[40]47 U.S.C. § 532.

[41]SCBA has filed extensive *Comments* and *Reply Comments* which can be found behind Tabs "F" and "G," respectively.